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No. 86-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. ROBERTSON,

Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
ROBERT A. KLECKNER
AND LARRY A. JOBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Employee Retirement Income Security Act of 1974 preclude a general partnership from including in its partnership agreement provisions that permit partners to retire at a specific age and to continue to share in the profits of the partnership for a ten-year period following their retirement but denying such profit-sharing rights to partners who withdraw from the partnership prior to retirement age?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are the petitioner James W. Robertson and the respondents Alexander Grant & Company (now known as Grant Thornton), Robert A. Kleckner and Larry A. Jobe.

The list of parties to the proceedings below is identical to the list of parties to this proceeding.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Alexander Grant & Company, Robert A. Kleckner, and Larry A. Jobe respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 798 F.2d 868 (1986).

STATEMENT OF THE CASE

The respondents incorporate by reference the statement of the facts in the opinion below at 798 F.2d at 869.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is a straightforward interpretation of a simply worded statute that is consistent with the Secretary of Labor's interpretation and is, in all respects, correct.

The Employee Retirement Income Security Act of 1974 ("ERISA") provides that it is applicable to "any employee benefit plan." 29 U.S.C. § 1003. The definition section of ERISA provides the following circular definition of an employee: "The term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(b). Both the District Court and the Court of Appeals turned to regulations promulgated by the Secretary of Labor pursuant to authority granted by ERISA, 29 U.S.C. § 1135, for further illumination concerning the meaning of the terms "employee benefit plan" and "employee." Those regulations provide that "plan[s] under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I," 29 C.F.R. § 2510.3-3(b) (1985), and "a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership," 29 C.F.R. § 2510.3-3(c)(2) (1985). The Court of Appeals held that these regulatory interpretations of ERISA were valid and upheld the District Court's conclusion that the Alexander Grant & Company ("Grant") partnership agreement applies only to partners so that it is not covered by ERISA. 798 F.2d 870-72. The lower Court's interpretation of ERISA was thus straightforward and correct and the Petition for Certiorari should be denied.

2. The decision below does not conflict with decisions of other courts of appeal, does not conflict with a state court of last resort, has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has not decided an important question of federal law which has not been settled by this Court.

The Petition cites no decisions by other courts of appeal that are in conflict with the decision of the Court below. The Petition also cites no decisions of state courts of last resort that

are in conflict with the decision below. The reason for this is simple: There are none.

The Petition also does not quarrel with the course of judicial proceedings in either the Court of Appeals or the District Court. That the matter of law that was dealt with below is not of public significance is demonstrated by the fact that in the twelve years since the adoption of ERISA, there has not been a single case in the entire federal court system seeking to apply ERISA to a partnership retirement plan contained exclusively in the general partnership agreement and that thus covers only partners. The Petition for Certiorari should be denied.

3. The decision below is consistent with the policy and objectives of ERISA.

The Petition for Certiorari in this matter, at pages 5 through 6, suggests that the opinion below held that any retirement plan adopted by a partnership was exempt from ERISA's protection. That suggestion is groundless. The Court of Appeals specifically held:

> We find the judgment correct based on the first ground relied on by the district court; therefore, we do not address the second and third grounds given by the district court .... The first ground that the district court relied on in granting summary judgment is that ERISA does not apply to the Grant retirement plan because ERISA does not cover plans applicable only to partners and because the Grant plan covers only partners.

798 F.2d 869. Thus, the decision of the Court below was narrowly limited and held only that plans that covered only partners in a partnership and did not cover any employees were exempt from ERISA's coverage. The opinion below will not support the inference the petitioner seeks to suggest by asking the rhetorical question "Why should Congress just want to cover corporate retirement plans?" Petition at 5. On the contrary, the Court below affirmed the District Court's decision

in reliance upon a regulation adopted by the Secretary of Labor, 29 C.F.R. § 2510.3-3(b) (1985), that includes the statement:

> However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I.

Thus, under the regulations interpreting ERISA, any of the 1,514,212 partnerships that filed tax returns in 1982 (Petition at 5) and that had a retirement plan covering even one common law employee were subject to ERISA coverage. Under the opinion below, the policy and objectives of ERISA are fully preserved.

4. The structure of ERISA does not indicate that "partners" are "employees" under ERISA and thus that their retirement plans are covered by ERISA.

The petitioner argues that because ERISA specifically excludes certain types of payments made by employee benefit plans to partners from the participation and vesting, funding, and fiduciary responsibility provisions of ERISA, plans that cover only partners must be generally covered by ERISA. Petition at 6-10. The types of payments excluded from those provisions are payments "described in section 736" of the Internal Revenue Code, 26 U.S.C. § 736. 29 U.S.C. §§ 1051, 1081, 1101. It is, however, entirely possible that a plan covering both employees and partners could make payments to partners that are described in section 736 of the Internal Revenue Code and that Congress intended such payments to be exempt from the vesting, funding, and fiduciary responsibility provisions of ERISA, and that the same plan could provide for payments to partners that are not described in section 736 but that Congress did not intend those payments to be exempt from those provisions. It is equally possible, as the Court of Appeals noted, that

> the secretary easily could have decided that Congress intended to exempt payments to partners from plans covering both employees and partners. Under such a construction of the statute, an exemption from the reporting and disclosure section is unnecessary because a joint plan would have to be registered due to the participation of non-partners in the plan and Congress did not need to provide an exemption from that section for payments to partners.

798 F.2d at 871. Thus, the structure of ERISA does not indicate that "partners" are "employees" under ERISA and that retirement plans covering only partners are covered by ERISA.

5. The legislative history of ERISA does not demonstrate that plans covering only partners are covered by ERISA.

The petitioner urges this Court to conclude, contrary to the conclusion of the Secretary of Labor, that Congress intended ERISA to cover self-employed individuals and owner-employees, such as partners, in the general definition of employee as a result of the elimination from an earlier draft of ERISA of an exception for self-employed individuals or owner-employees in the list of exceptions from general ERISA coverage now contained in section 1003(b) of ERISA. Petition at 10-11. The elimination of that provision, however, is equally explained by Congress' belief that the self-employed individual or owner-employee exclusions was not necessary in light of the definition of "employee" contained in the definition section of ERISA: "The term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(b). The common sense definition of the word does not include partners.

Moreover, the interpretative regulations of the Secretary of Labor are entitled to great deference, *Sure-Tan, Inc. v. National Labor Relations Board,* 467 U.S. 833 (1984), and if they are "not inconsistent" with the legislative history, the courts will sustain them, *Lawrence County v. Lead-Deadwood School Dis-*

trict No. 40-1, 469 U.S. 256 (1985). This deference to the Secretary of Labor's interpretation is particularly enhanced, inasmuch as Congress has twice amended ERISA's definitions sections since the statute's enactment and in neither instance has Congress altered the definition of "employee" or "employee benefit plan." *See Board of Governors v. First Lincolnwood Corp.,* 439 U.S. 234 (1978). In short, the legislative history of ERISA does not suggest that the decision of the Court below was erroneous.

6. The Court of Appeals did not base its construction of ERISA on a faulty factual assumption.

The petitioner contends that the Court of Appeals based its decision upon the faulty factual assumption that the petitioner was a partner in Grant. At a time before this litigation was pending, however, the petitioner himself recognized the distinction between employees and partners and that the distinction was applicable to his position at Grant. In a letter the petitioner wrote to the respondent Kleckner on May 7, 1979, the petitioner stated, "I was a employee for six years and a partner for the last thirteen . . . ." Petition at A12. As a partner, the petitioner had all of the rights to participate in the management of the partnership secured to him by the partnership agreement, as well as the right to participate in its profits. He also had all of the rights that were secured to him by the Uniform Partnership Act except to the extent that they were limited by the partnership agreement. Those rights were considerably greater than the rights that are available to common law employees. The decision of the Court of Appeals was not based upon a faulty factual assumption.

7. The discrimination, if any, in favor of highly compensated "employees" in the Grant partnership agreement is not prohibited.

The petitioner argues that under section 401(a)(4) and section 410 of the Internal Revenue Code, 26 U.S.C. §§ 401(a)(4), 410, the Grant partnership agreement cannot discriminate in favor of Grant's partners and against others. It should be noted, however, that sections 401(a)(4) and 410 are applicable only to plans that are qualified for favorable tax treatment and the Grant partnership agreement is not such a plan.

The petitioner also argues that because a regulation adopted by the Secretary of Labor under ERISA provides that regulations prescribed by the Secretary of the Treasury under sections 410 and 411 of the Internal Revenue Code are applicable for purposes of sections 202 and 204 of ERISA (29 U.S.C. §§ 1054, 1056), no retirement plan of any type can exclude an employee if the employee meets the minimum requirements of ERISA coverage provided by 29 U.S.C. § 1053. The argument is specious inasmuch as sections 202 and 204 of ERISA are applicable only to "employee benefit plans" and the Grant partnership agreement is not an "employee benefit plan." 29 C.F.R. §§ 2510.3-3(b), 2510.3-3(c)(2) (1985). Thus, if there is discrimination in the Grant partnership agreement, it is a discrimination that is not prohibited by the Internal Revenue Code, ERISA, Treasury regulations adopted under the Internal Revenue Code, or Labor Department regulations adopted under ERISA.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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